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Attorney For Plaintiff David Berger

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re
LESLIE KLEIN,
Debtor and Debtor in Possession,

DAVID BERGER,
Plaintiff

vs.

LESLIE KLEIN
Defendant

Case No. 2:23-bk-10990-SK

Adv. No. 2:23-ap-01169-SK

Hon. Sandra Klein

Chapter 11

**OPPOSITION TO MOTION FOR ORDER
DISMISSING CERTAIN CAUSES OF ACTION
IN COMPLAINT FOR DENIAL OF
DISCHARGE PURSUANT TO 11 USC §
727(a)(2)(A); 11 USC § 727(a)(2)(B); 11 USC §
727(a)(3); 11 USC § 727(a)(4); 11 USC § 727(a)(5)**

Date: 10-18-2023

Time: 9:00am

Place: 255 E. Temple Street, Los Angeles

Courtroom: 1575

**TO THE HONORABLE SANDRA R. KLEIN, UNITED STATES BANKRUPTCY
JUDGE, THE DEBTOR AND HIS COUNSEL, AND ALL OTHER INTERESTED
PARTIES:**

Plaintiff-Creditor, David Berger (“Plaintiff”), hereby opposes the Motion for Order
Dismissing Certain Causes of Action in Complaint for Denial of Discharge Pursuant to 11 USC
§ 727(a)(2)(A); 11 USC § 727(a)(2)(B); 11 USC § 727(a)(3); 11 USC § 727(a)(4); 11 USC §
727(a)(5) (the “Motion”) filed by Defendant-Debtor, Leslie Klein (“Defendant”), and allege
respectfully as follows:

Defendant’s Motion relies exclusively on *In re Duncan*, 2012 Bankr. Lexis 524, 2012

1 WL 5462917 (Bankr. Az. 2012) for the proposition that the Fourth Cause of Action (11 U.S.C §
2 727(a)(2)(A), Fifth Cause of Action (11 U.S.C § 727(a)(2)(B), Sixth Cause of Action (11 U.S.C
3 § 727(a)(3), Seventh Cause of Action (11 U.S.C § 727(a)(4) and Eighth Cause of Action (11
4 U.S.C § 727(a)(5) (collectively, the “727 Causes of Action”) all must be dismissed by the Court
5 because these causes of action are only applicable to chapter 7 individual debtors, and this is a
6 chapter 11 case.

7 However, the Arizona *Duncan* case appears to be considered in the context of a
8 confirmed individual ch. 11 plan. In a ch. 11 case, before a case can be confirmed, a debtor is
9 required to pay its creditors as much as, or more than they would stand to realize upon
10 liquidation. 11 U.S.C. § 1129(a)(7). This is known colloquially as the "best interests of creditors
11 test" - voluntary repayment to creditors of more than they could realize in a liquidation.

12 11 U.S.C. § 1141(d)(3) provides:

13 The confirmation of a plan does not discharge a debtor if--

14 (A) the plan provides for the liquidation of all or substantially all of the property
15 of the estate;

16 (B) the debtor does not engage in business after consummation of the plan; and

17 (C) the debtor would be denied a discharge under section 727(a) of this title if the
18 case were a case under chapter 7 of this title.

19 11 U.S.C. § 1141(d)(3).

20 Its applicable corollary statute is 11 U.S.C. § 1141(d)(5), which mandates, in an
21 individual ch. 11, that its general rule is that individuals do not gain a discharge until they
22 complete "all payments under the plan" 11 U.S.C. § 1141(d)(5)(A).

23 In order for a § 727(a) challenge to be sustained, three elements must be met. This is
24 because § 1141(d)(3) has three subparts to it, which are conjoined by the word "and." This
25 means that, for a § 727(a) challenge to move forward under § 1141(d)(3)(C), a creditor must also
26 show that the other two elements, (A) and (B), favor its position. [*8] The use of the word "and"

1 in § 1141(d)(3), to include all segments of the subparts A, B and C, is one of the clearest and
2 easiest statutory principles to apply. See *In re First Magnus Fin. Corp.*, 403 B.R. 659, 665 (D.
3 Ariz. 2009) (The connector "and" requires that both parts of a subsection must exist), affirming
4 and citing *in re First Magnus Fin Corp.*, 390 B.R. 667, 676 (Bankr. D. Ariz. 2008) (citing 1A
5 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:27 (7th ed. 2008)).

6 If any one of the three subparts cannot be shown, an individual creditor may not proceed
7 solely on the § 1141(d)(3)(C) prong (the § 727(a) feature of the statute). See *Matter of T-H New*
8 *Orleans Ltd. P'ship*, 116 F.3d 790, 803 (5th Cir. 1997); *In re Berg*, 423 B.R. 671, 677 & n.27
9 (10th Cir. BAP 2010); see also *Grausz v. Sampson (In re Grausz)*, 63 Fed. Appx. 647, 650 (4th
10 Cir. 2003) (lower court erred in failing to consider second element of § 1141(d)(3) before
11 denying ch. 11 debtor's discharge). See generally 8 COLLIER ON BANKRUPTCY ¶ 1141.05[4]
12 (16th ed. 2012).

13 The legislative history to § 1141(d) states:

14 Paragraph (3) specifies that the debtor is not discharged by the confirmation of a plan if
15 the plan is a liquidating plan and if the debtor would be denied a discharge in a
16 liquidation case under Section 727. Specifically, if all or substantially all of the
17 distribution under the plan is of all or substantially all of the property of the estate or the
18 proceeds of it, if the business, if any, of the debtor does not continue, and if the debtor
19 would be denied a discharge under section 727 (such as if the debtor were not an
20 individual or if he had committed an act that would lead to denial of discharge), then the
21 Chapter 11 [*10] discharge is not granted.

22 House Rep. No. 95-595, 95th Cong. 1st Sess. 418-19 (1977), reprinted in, 1978 U.S.C.C.A.N.
23 5963, 6374-75.

24 **Subsection A: The First Prong - Liquidation:** The first prong of 1141(d)(3) states that
25 "the plan provides for the liquidation of all or substantially all of the property of the estate."
26

1 Here, the Debtor has not filed a plan or disclosure statement, and certainly cannot provide
2 for a liquidation of any of his individually owned assets - as the Debtor's disclosures to the court
3 reveal he has none. The Debtor has virtually no income, and cannot repay his creditors. Without
4 any plan or disclosure statement on file, it is premature to conclude that Plaintiff cannot proceed
5 with the § 727(a) portion of his complaint.

6 **Subsection B: The Second Prong — Business Does Not Continue:** The second subpart
7 of § 1141(d)(3) reads: "the debtor does not engage in business after consummation of the
8 plan." In this case, the disgraced lawyer, accountant Debtor has no income and has disclosed no
9 ability to continue to earn income from various sources. Without such abilities, and without any
10 plan or disclosure statement on file, it is premature to conclude that Plaintiff cannot proceed with
11 the § 727(a) portion of his complaint.

12 **The Third Prong — Objection to Discharge:** The Complaint cites appropriate facts
13 surrounding the allegations of the § 727 aspects of the Debtor's behavior.

14 Finally, in the event that this chapter 11 bankruptcy gets converted into chapter 7,
15 Plaintiff's 727 Causes of Action should be reserved, and if the Court is inclined to grant
16 Defendant's Motion, it should be without prejudice to preserve Plaintiff's 727 Causes of Action
17 against Defendant.

18
19
20 DATED: September 7, 2023

LAW OFFICE OF BARUCH C. COHEN
A Professional Law Corporation

21
22 By /s/ Baruch C. Cohen
Baruch C. Cohen, Esq.
23 *Attorney for Creditor David Berger*

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

4929 Wilshire Boulevard, Suite 940, Los Angeles, California 90010.

A true and correct copy of the foregoing document entitled: **OPPOSITION TO MOTION FOR ORDER DISMISSING CERTAIN CAUSES OF ACTION IN COMPLAINT FOR DENIAL OF DISCHARGE PURSUANT TO 11 USC § 727(a)(2)(A); 11 USC § 727(a)(2)(B); 11 USC § 727(a)(3); 11 USC § 727(a)(4); 11 USC § 727(a)(5)** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On 9/7/2023, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Michael S Kogan (DF)	mkogan@koganlawfirm.com
Baruch C Cohen (PL)	bcc@BaruchCohenEsq.com, paralegal@baruchcohenesq.com
Michael I. Gottfried (IP)	mgottfried@elkinskalt.com, cavila@elkinskalt.com, lwageman@elkinskalt.com, docketing@elkinskalt.com
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Clarisse Young (IP)	youngshumaker@smcounsel.com, levern@smcounsel.com
United States Trustee (LA)	ustpreion16.la.ecf@usdoj.gov

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL: On 9/7/2023, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on 9/7/2023, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Hon. Sandra R. Klein, 255 E. Temple Street, Suite 1582, Los Angeles, CA 90012

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

9/7/2023
Date

Baruch C. Cohen, Esq.
Printed Name

/s/ Baruch C. Cohen
Signature